United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7060

To be argued by
SHELDON A. VOGEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE SANKO STEAMSHIP CO., LTD.,

Plaintiff-Appellant,

against

NEWFOUNDLAND REFINING COMPANY, LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED, PROVINCIAL HOLDING COMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF THE CASE.

The Plaintiff-Appellant (Plaintiff) appeals from a judgment dated March 4, 1976, of the United States District Court for the Southern District of New York (Whitman Knapp, D. J.) dismissing Plaintiff's complaint and vacating a temporary restraining order issued by said Court. (App. '76).

On the 17th day of February, 1976, plaintiff instituted an action in admiralty pursuant to Rule 9 (h) of the Federal Rules of Civil Procedure against defendants for failure to pay charter hire in the sum of $8,112,323.68 due it under three (3) charter parties dated August 8, 1972, between plaintiff and de.endant NEWFOUNDLAND REFINING COMPANY LIMITED (hereinafter "N.R.C."). On the

same day plaintiff obtained from the aforesaid Court (Whitman Knapp, D.J.) pursuant to Rule B (1) of Supplemental Rules for Certain Admiralty and Maritime Claims, and Section 6201 of the Civil Practice Law and Rules of the State of New York, a temporary restraining order against defendants and the SUMITOMO BANK, LTD., EUROPEAN AMERICAN BANK & TRUST CO. and MANUFACTURERS HANOVER TRUST COMPANY preventing defendants from removing, releasing or secreting the cumulative amount of $3,000,000 from accounts which defendants had at said banks, together with an order to show cause as to why plaintiff was not entitled to an attachment of funds and/or credits in any and all accounts maintained by defendants at said banks in the aforesaid cumulative amount.

Said temporary restraining order was returnable at 3:00 P.M. on February 20, 1976, before Judge Knapp. However, said temporary restraining order also provided:

> "The return date herein has been set without prejudice to an application for acceleration thereof by defendants."

On February 17, 18 and 19, 1976, the aforesaid banks and defendants were personally served with copies of the temporary restraining order and late in the afternoon of February 18, 1976, counsel for plaintiff was advised by counsel for defendants that the return date, pursuant to the above quoted language, had, at their

request, been accelerated to 10:00 A.M. on February 19, 1976, before Judge Knapp.

From February 19, 1976, to March 4, 1976, several hearings were had before Judge Knapp and before this Court that are not germaine to the sole issue on this appeal and involved matters, in part, of a procedural nature. On March 4, 1976, however, a hearing was held before Judge Knapp who entered the judgment dated March 4, 1976, from which this expedited appeal has been taken.

Issue Presented

The only issue on this appeal is the correctness of the ruling of the District Court that it was required to dismiss the complaint and vacate the temporary restraining order solely on the authority of The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1971) (Order of this Court dated March 22, 1976).

POINT I

THE CASE OF THE BREMEN V. ZAPATA OFF-SHORE CO. (407 U.S. 1 [1971], NEVER REACHED THE ISSUE OF WHETHER THE COMPLAINT WAS TO BE STAYED AND SECURITY ALLOWED TO STAND

The District Court in the instant case ruled that under the authority of The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 [1971], it was required to dismiss the complaint and temporary restraining order.

This ruling was based on the following clause contained in all three charter parties described in the complaint:

> "40.(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
>
> (b) Any dispute arising under this charter shall be decided by The English Courts to whose jurisdiction the parties agree whatever their domicile may be:
>
> Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force." (App. A31).

The District Court ruled the above quoted clause was so similar to the clause in the Zapata case that it was required to enforce said clause and dismiss plaintiff's complaint, and therefore, the temporary restraining order.

It is plaintiff's contention on this appeal that the District Court has incorrectly extended the holding of Zapata.

In Zapata Unterweser agreed to tow the former's drilling rig from Louisiana to Italy. The agreement contained the following clause:

> "Any dispute arising must be treated before the London Court of Justice."

While Unterweser's tug, THE BREMEN, had Zapata's drilling rig under tow bad weather was encountered, the rig was damaged and Zapata instructed Unterweser to have the tug tow the rig to Tampa, Florida. Upon arrival in Tampa, Zapata instituted actions in admiralty in the United States District Court in Tampa in rem against THE BREMEN, having it arrested, and in personam against Unterweser seeking damages in the amount of $3,500,000. Unterweser furnished security in the amount of $3,500,000 (470 U.S. at p. 4, footnote 3). Unterweser thereafter invoked the above-quoted forum selection clause and moved to dismiss the actions for lack of jurisdiction or forum non conveniens, or in the alternative, "to stay the action pending submission of the dispute to the 'London Court of Justice.'" (407 U.S. at p. 4)

Thereafter, Unterweser instituted an action in London against Zapata for breach of the towage agreement and Zapata moved to dismiss, contesting the London Court's jurisdiction and said Court held that it had jurisdiction pursuant to the aforesaid forum selection clause.

Unterweser now found himself in a difficult situation inasmuch as the District Court had yet to rule on his motions to dismiss or stay Zapata's action and the period to file a limitation of liability action was about to expire. Accordingly, Unterweser filed an action to limit its liability in District Court in Tampa. That court, as is usual in limitation proceedings, issued an injunction against proceedings outside its court and Zapata refiled its initial claim in the limitation action.

Thereafter the District Court denied Unterweser's motion to dismiss or stay the proceedings before it and this decision was affirmed by the Court of Appeals for the Fifth Circuit.

Subsequently, Unterweser moved the District Court to stay the limitation proceedings pending determination of the litigation in London. The court denied the motion but granted a motion by Zapata to enjoin Unterweser from litigating the action further in the

London Court. Unterweser appealed and the Fifth Circuit affirmed the District Court and on rehearing en banc a divided Court of Appeals adopted the panel's opinion.

Unterweser petitioned the Supreme Court for a Writ of Certiorari which was granted and the Supreme Court vacated the decision of the Court of Appeals and remanded the case for further proceedings holding that the forum selection clause in the agreement was valid and should be enforced absent a showing by Zapata that enforcement thereof would be unreasonable or unjust or that such clause was invalid for reasons such as fraud or overreaching. The Fifth Circuit thereafter remanded the case to the District Court for further proceedings in accordance with the holding of the Supreme Court.

The District Court in the instant case interpreted the Supreme Court's decision in Zapata as standing for the proposition that if an agreement contains a forum selection clause it is required to dismiss the United States action without making any alternative arrangements whereby the plaintiff could retain security it may have obtained through Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims.

Plaintiff respectfully submits that the District Court has too narrowly construed the holding in Zapata. It is submitted that Zapata stands solely for the proposition that where an agreement contains a choice of forum clause such clause should be enforced absent a showing that enforcement thereof would be unreasonable and unjust or that the clause is invalid for reasons such as fraud or overreaching. Zapata does not stand for the proposition that where an agreement contains a forum selection clause, one of the parties to such an agreement is precluded from instituting an action outside of the designated forum to obtain security for its claim, and having once obtained such security that the court where such security was obtained cannot stay the action pending a determination of the dispute in the chosen forum.

A review of the procedural rulings in the Zapata case, from the District Court level to the decision by the Supreme Court, clearly reveals that the Supreme Court never reached the issue of whether it would have been proper for the District Court to have stayed Zapata's action pending determination of the dispute in the London Court of Justice while retaining the security posted by Unterweser. It is thus a case of first impression for this Court.

It is to be noted that Unterweser on two (2) occasions moved the District Court in Tampa either to dismiss the case for forum non conveniens or lack of jurisdiction based on the forum selection clause contained in the towage agreement, or, in the alternative, to stay the proceedings pending determination of the litigation in London.

The District Court, in ruling on Unterweser's motions, consistently held that the forum selection clause contained in tne agreement was unenforceable, and therefore, never had to reach the issue of whether it would have been proper for it to have stayed Zapata's action. Therefore, when the Court of Appeals for the Fifth Circuit affirmed the rulings of the District Court that the forum selection clause was unenforceable it did not have to reach the issue of whether it would have been proper for the District Court to have stayed Zapata's action and remanded the parties to the London Court of Justice.

Accordingly, when the Supreme Court decided Zapata and reversed the Court of Appeals it did so only on the basis that the forum selection clause was valid and enforceable. The issue of whether a stay by the District Court would have been proper was not before the Supreme Court for the same reason it was not before the Court of Appeals.

The only time the issue of whether it would have been proper for the District Court to have stayed Zapata's action would have been on remand to the District Court from the Court of Appeals and only if Zapata would have been unable to meet the burden of showing that it would have been unreasonable or unjust to have the action litigated in London, or that the forum selection clause was invalid for reasons of fraud or overreaching. Assuming Zapata was unable to meet the burden of proof as aforesaid, presumably it would have moved the District Court to stay its action while retaining the security posted by Unterweser. However, there appears to be no further report of decisions in Zapata upon remand to the District Court. The security issue was eliminated in that case by Unterweser agreeing to post security to be available in London as well as Florida (App.)

It is submitted therefore that case law, prior and subsequent to Zapata, pertaining to obtaining security in a jurisdiction other than the jurisdiction in which the action is to be tried pursuant to a forum selection clause, is controlling.

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POINT II

FEDERAL COURTS HAVE CONSISTENTLY STAYED ACTIONS AND RETAINED SECURITY ALTHOUGH SENDING LITIGANTS TO FOREIGN JURISDICTIONS

As recognized by the Supreme Court in Zapata, present day realities and expanding international trade require that parties to agreements, especially agreements relating to the chartering of vessels on a world wide scale, select a forum agreeable to both where disputes arising under the terms of the agreement are to be resolved. That this fact is true, one need only to refer to any one of the standard charter party forms presently being used in the trade and one will find a clause similar to the one used in the charter parties involved in the instant case. The reason for such a clause is clear and in the language of the Supreme Court:

> "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left open to any place where the BREMEN or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." (p. 13)

It is submitted, therefore, that the reason such forum selection clauses have been inserted in agreements such as charter parties is so that the parties know in advance where disputes arising out of the agreement shall be resolved; but this is not to say that by the insertion of such a clause in the agreement the parties have agreed that is the only forum where one may seek to protect its interests. See, e.g. Thomas S. Keaty v. Freeport Indonesia Inc., 503 F. 2d 955 (5th Cir. 1974). This is especially true of admiralty cases where it is common for the party instituting an action to seek security for its claim by obtaining security through the use of an in rem claim against a vessel, or by arresting a vessel or attaching bank accounts pursuant to a Writ of Foreign Attachment, or by instituting an action in admiralty but invoking a particular state's attachment procedures to arrest a vessel or attach a bank account. All of the foregoing remedies are specifically allowed pursuant to the Supplemental Admiralty Rules for Certain Maritime Claims, and Federal Courts have consistently allowed one party to invoke the foregoing admiralty procedures to obtain security for its claim even though the ultimate determination of the dispute will be accomplished in a jurisdiction other than where the security was obtained pursuant to a forum selection clause. Furthermore, that

this is true with regard to arbitration of disputes cannot be questioned.

The case of Carbon Black Export v. The SS MONROSA, 254 F. 2d 297 (5th Cir. 1958), involved a libel for damages to and nondelivery of cargo by a United States plaintiff against an Italian vessel upon which the cargo was carried and the owner of the vessel. The bills of lading pursuant to which the cargo was carried contained a forum selection clause providing that any proceedings against the vessel, her master or her owner for damage to the cargo had to be brought in Genoa, Italy.

Plaintiff libeled the vessel in Houston, Texas and the Italian owner moved to dismiss on the basis of the forum selection clause contained in the bill of lading.

The District Court in a Memorandum opinion ruled that the provision in the bill of lading was enforceable and therefore the litigation must proceed in Genoa. The District Court in so holding stated:

> "Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is now shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from the date hereof, deliver to Libelant a good and sufficient bond, in the principal amount of one hundred thousand

dollars ($100,000.00) guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, the SS Monrosa * * *". (Quoted from the Fifth Circuit Opinion, 254 F. 2d at page 299, Footnote 2)
(Emphasis added)

The Fifth Circuit reversed the District Court, holding that the forum selection clause, in the bill of lading was not enforceable and that Libelant was entitled to bring its in rem action in the United States. However, it is to be noted that the Court of Appeals did not make mention of the District Court's disposition of the case insofar as it required Respondent to post security with the Libelant as a condition to the District Court ordering the parties to proceed to litigate the dispute in Italy. Accordingly, the ruling of the District Court must still be considered controlling law.

That this is true is shown by the decision of Indussa Corporation v. S.S. RANBORG, 260 F. Supp. 660 (USDC SDNY 1966) reversed 377 F. 2d 200 (2nd Cir. 1967) which involved a libel in rem against the vessel RANBORG for damage to cargo she was carrying. The bills of lading pursuant to which the cargo was carried had a clause providing that any dispute arising under the bills of lading was to be decided in the country where the carrier had his principal place of business.

For other pre-Zapata decisions dismissing actions brought in United States and relegating litigants to foreign jurisdictions on condition that security be posted, see Hatzaglou v. Asturias Shipping Company, S.A., 193 F. Supp. 195 (S.D.N.Y. 1961), Brillis v. Chaudris U.S.A.) Inc., 215 F. Supp. 520 (S.D.N.Y. 1963), Garris v. Compania Maritima San Basilio, 261 F. Supp. 917 (S.D.N.Y. 1966), aff'd. 386 F.2d 157 (2 Cir. 1969).

In Garis v. Compania Maritima San Basilio, supra, the Court dismissed the action on the ground of improper forum but conditioned dismissal on defendant's willingness to appear in any action commenced in Greece and the posting of security. This Court affirmed "the discretionary act by which the taking of jurisdiction was conditionally declined."

In a recent post-Zapata decision, Kooperativa Forbundet, Stockholm v. Vaasa Line Oy, Partenreederei M.S. Ursula Jacob, and the S.S. Ursula Jacob, etc. (1975 A.M.C. 1972, unreported elsewhere), the United States District Court for the Southern District of New York (Ward, D.J.) conditionally granted a motion for an order dismissing the action on the ground of forum non convenience. This was not a COGSA case and involved an in rem action by a Swedish shipper against a Finnish vessel for cargo damage. The jurisdiction clause in the bill of lading read as follows:

> "Any claim against the Carrier arising under this Bill of Lading shall be decided at the principal place of business of the Carrier in accordance with the law of the place to which the Carrier and the Merchant hereby submit themselves."

The court citing Zapata held that the above clause was a forum selection clause and was prima facie valid and enforceable. The Court accordingly granted defendant shipowner's motion to dismiss on condition

> "that both defendants submit to the jurisdiction of the courts of Finland without raising any defenses based on laches or time bars, provided such jurisdiction is invoked by plaintiff in a reasonable time and that defendant shipowner deposit a bond in Finland equal to that in this action and incorporating the same terms and conditions."

It is respectfully summitted that the District Court should have adopted Judge Ward's approach.

Finally, as noted previously, it has clearly been the law that in an Admiralty proceeding involving an agreement containing a foreign arbitration clause, the party instituting a legal action can obtain security therein and the Court will merely stay the proceeding pending final determination of a foreign arbitral board. Danielsen v. Entre Rios Rys. Co., 22 F.2d 326 (D.C. Md. 1927) (arbitration in England); The Quarrington Court, 25 F. Supp. 665 (D.C.N.Y. 1938) (arbitration in England); Uniao De Transportadores, etc. v. Companhia De Navegacao, etc., 84 F. Supp. 582 (D.C.N.Y. 1949) (arbitration in Portugal); International Refugee Organization v. Republic S.S. Corp.

93 F. Supp. 798 (D.C. Md. 1950) appeal dismissed 189 F. 2d 858 (4th Cir. 1951) (arbitration in England; Fox v. The Giuseppe Mazzini, 110 F. Supp. 212 (D.C.N.Y. 1953) (arbitration in England); Mannesmann Rohrlei Tungsbau v. S.S. HOWALDT, 254 F. Supp. 278 (S.D.N.Y. 1965) (arbitration IN Holland); Konstantinidis v. S.S. TARSUS, 248 F. Supp. 280 (D.C.N.Y. 1965) aff'd 354 F. 2d 240 (2d Cir. 1965).

It is submitted that there is no difference between an arbitration provision in an agreement providing for arbitration of disputes in a named jurisdiction and a forum selection clause such as is involved in the instant case. This fact has been recognized by the Supreme Court as recently as Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) where the Court stated at page 519:

> "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."

It is not surprising to note that in making the foregoing statement the Supreme Court cited the Zapata decision as authority for enforcing arbitration selection clauses contained in agreements. It is submitted therefore, that if an arbitration clause is considered to be a forum selection clause, and if a party is able to obtain security in a jurisdiction other than that where the arbitration shall proceed and retain such security until determination of the arbitration proceedings by having the action pursuant to which the security was obtained stayed, the same result should obtain where the forum selection clause provides for litigation of any disputes in a chosen jurisdiction and one party thereto institutes an action in another jurisdiction seeking security for the pending litigation.

If this Court affirms the Judgment of the District Court, it is not unfair to say that a substantial segment of admiralty and maritime law and practice will be changed. Virtually every form of charter party or contract of affreightment contains a forum selection clause, and if this Court affirms the holding of the District Court then the question must be asked of what further use are the Supplemental Rules For Certain Admiralty and Maritime Claims. The foregoing rules are

constantly invoked to arrest vessels or attach assets of a party to a maritime agreement as security for a claim or claims arising out of said agreement; if this Court denies such a party the right to obtain security outside the jurisdiction where the parties have agreed only to litigate or arbitrate such disputes, said Supplemental Rules will be virtually useless.

POINT III

THE ZAPATA CASE AS INTERPRETED BY THE DISTRICT COURT WOULD, IN EFFECT, REPEAL SECTIONS 3 AND 8 OF THE FEDERAL ARBITRATION ACT.

If the United States Supreme Court in Scherk v. Alberto-Culver Co., supra, has held that an agreement to arbitrate is in effect a forum selection clause, the holding of a District Court would bar a plaintiff from obtaining security pending a final award of arbitrators as permitted under the Federal Arbitration Act. To illustrate, assume that in the instant case plaintiff had instituted its action in admiralty and had attempted to obtain an attachment pursuant to Section 8 of Article 9 U.S.C.A., which provides:

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award." (emphasis added)

Clearly, plaintiff would have been permitted to do this as the instant cause of action is cognizable in admiralty and the charter parties provide that either party thereto may submit any disputes to arbitration in London.

Having once obtained the security sought, the District Court, pursuant to the above statute, would then stay plaintiff's action, retain the security attached, and direct the parties to proceed to arbitration in London. While it is true that the District Court would not have authority to compel the parties to arbitrate in England, "the plaintiff" could "never get relief unless he proceeds to arbitration." (The Anaconda v. Amer. Sugar Co., 322 U.S. 42 (1944) at p. 45.) Accordingly, the plaintiff would proceed to England and institute arbitration proceedings against the defendant with the security obtained in the District Court remaining to satisfy any award rendered in plaintiff's behalf.

However, even if the District Court would not, on its own initiative, have stayed plaintiff's action and directed the parties to arbitrate their dispute in England in accordance with the forum selection clause, plaintiff, pursuant to Section 3, Article 9 U.S.C.A., which provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

could have moved to the District Court to stay its own

action and have requested the District Court to direct the parties to proceed to arbitration in England while retaining possession of the security attached.

It is submitted that in such a case plaintiff would not be "in default in proceeding with" the arbitration, and as plaintiff is "one" of the parties to the dispute, it would be allowed under the terms of the foregoing Section 3 to stay its own action.

Clearly, in the above example, plaintiff would not be violating the terms of the charter parties entered into with defendant Newfoundland Refining Company, Limited. However, if the District Court's judgment is affirmed by this Court, it is submitted that plaintiff would not be entitled to proceed as outlined above. As noted previously, the District Court held that Zapata absolutely forbids the institution of an action - any action of any nature whatsoever - outside of the selected forum. Accordingly, if this Court affirms the Judgment of the District Court, it is submitted that Section 8 of Article 9 U.S.C.A. will be rendered meaningless.

On the other hand, if this Court attempts to distinguish the arbitration provision of an agreement from a litigation provision of an agreement, it would be difficult to understand the basis for such a distinction. Why should one be permitted in an arbitration situation to obtain security by the institution of an action which

the Court on its own initiative will, or upon motion of one of the parties to said agreement, stay the action pending determination of the arbitration, whereas one is denied the right to obtain such security if a forum selection clause provides for all disputes to be decided in a foreign court. Clearly, the reason for obtaining security in either instance is precisely the same. The inconsistency of Judge Knapp's ruling is apparent when one notes that the charter parties in the instant case give either party the right to litigate or arbitrate disputes. If plaintiff had proceeded under Section 8 of the Arbitration Act, it clearly would be allowed to attach defendants' assets, whereas by not making an election as to the method it wished to invoke to have the dispute herein decided, it is denied the right to obtain security. This would be inequitable and an unnecessary extension of the Zapata ruling.

CONCLUSION

It is respectfully requested that this Court reverse the ruling of the District Court and enter its Judgment that plaintiff is entitled to maintain the present action solely for the purpose of obtaining security pending determination of the dispute in England.

Respectfully submitted,

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff-Appellant

Dated: New York, New York
April 5, 1976

Sheldon A. Vogel

John H. Parker
Of Counsel

Service and receipt of THREE copies
of the within BRIEF is hereby
admitted this 5th day of APRIL 1976

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Attorneys for APPELLANTS